Penal Benefit-Based Construction System on Indonesian Environmental Criminal Law Settlement Policy According to Environmental Rule of Law Paradigm

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Abstract. The environmental rule of law paradigm requires the existence of a special mechanism that involves all parties in realizing an integrated environmental law system which is not only aimed at enforcing legal certainty but also for realizing justice for all elements, both humans and the environment itself. One aspect of the mentioned special mechanism is law enforcement against environmental crime cases which not only prioritizes the deterrent effects against perpetrators for the sake of law and order, but also must pay attention to the benefit aspects, especially related to the restoration of the environment damaged or polluted due to the crimes committed. This is in line with Principle 10 of the Rio Declaration, which specifies the need for 'Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided' by States in environmental matters'. Based on the results of the author's research, Law Number 32 of 2009 concerning Environmental Protection and Management as a general provision of national environmental protection and management (general environmental law) has regulated the specificity in solving environmental crime cases. However, the author has not found any confirmation regarding the paradigm behind the penal policy towards the settlement of environmental crimes in Indonesia. The ambiguity of this paradigm has influence on the level of effectiveness of environmental law in Indonesia where criminal law enforcement against environmental crime cases does not contribute in a balanced way with efforts to improve the conditions of decreasing environmental carrying capacity. In fact, crimes related to the environment always have a business or financial motive in which the management of natural resources tends to be inconsistent with the general environmental law principle. Therefore, environmental law enforcement instruments should prioritize the benefits of law for each party so that a collaborative approach between law enforcement efforts that are in line with efforts to advance the business world has become a must. If reviewed based on the benefit-based penal policy, this collaborative approach is needed to ensure the effectiveness and efficiency of the criminal law enforcement process in solving environmental problems. This condition then became a trigger for the author to examine how the criminal law enforcement mechanisms against environmental crimes in Indonesia should be implemented based on the principles of the Environmental Rule of Law as a special paradigm in international policies in handling of environmental problems. The author in this paper uses a doctrinal/juridical- contextual research method that focuses on

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research on legal principles, legal systematic analysis, and legal comparisons, to find the right construction in establishing a mechanism for resolving environmental crimes based on a benefit-based penal system in Indonesia.

Keywords: Environmental Rule of Law · Environmental Crime · Benefit-Based Criminal System

1 Background

In its development, the concept of development can always be directly related to human activities in meeting their needs, which can no longer only be seen as a once completed activity but is something that is sustainable and has many interrelated aspects. Among them are vital, namely regarding economic aspects and environmental aspects because every development always involves these two aspects, which then underlies the formation of the concept of environmentally sound development.

Related to the two interests that exist in the concept of environmentally sound development, economic interest is one of the interests that has been protected by law for a long time. In contrast to environmental interests, the concept of legal protection can only be seen in the 20th century, especially regarding the use of criminal law instruments in protecting environmental interests, which arise from universal demands on the importance of protecting the carrying capacity of the environment for human life. The Council of Europe Resolution 77 (28) emphasizes the need for the contribution of criminal law in the context of protecting the environment [1].

Nevertheless, the use of criminal instruments in protecting the interests of the environment is not without consequences, because the criminal instruments themselves are harsh and coercive, as according to Piet Hein Van Kempen [2] who explained that:

> "Criminal instruments include the most severe instruments that states have in peacetime. It's basically coercive. Likewise for the intrusion of its criminal investigative powers (including arrest and detention) as well as for the severity of sanctions (including imprisonment), the purpose of both is to enforce the strict limits on human behavior imposed by criminalization. The essential violation by the application of criminal law and criminal procedure to individual freedom and social space is a universal feature."

Based on its nature, criminal instruments are still the most effective instruments and are often used for the purpose of punishing criminals with the aim of creating a deterrent effect so that violations are not committed by others. This is quite risky if applied in cases related to the use of the environment, especially in the context of environmentally sustainable development, because the interests to be achieved in this context are not only to punish perpetrators of environmental crimes, but also to preserve and restore environmental functions that damaged by a development activity. Moreover, in the context of sustainable development, the economic aspect that is carried out through business activities both by individuals and corporations is an aspect that must still be protected because it is related to efforts to meet the needs of people's lives.

This condition raises the need to create an environmental legal system that can balance the interests contained in the existence of an environmentally sound development, internationally since 2013, UNEP (United Nations Environment Program) has produced a decision in which the term was first known as "environmental rule of law" [3] which according to Fulton is defined as "actualization of thus expectation, a state of existence, in which the law in fact prevails" which implies an effort to realize environmental law norms into factual reality in our nation's life or make environmental law norms apply empirically [3]. The importance of the Environmental rule of law is mentioned in the first global report published in 2019 as "….an essential platform underpinning the four pillars of sustainable development—economic, social, environmental, and peace" [4].

In the environmental rule of law paradigm, criminal instruments in environmental cases are applied proportionally by placing criminal instruments as the last resort in enforcing environmental cases or what is called the ultimum remedium principle. In Indonesia, the legal policy regarding the environment has been renewed with the enactment of Law Number 32 of 2009 concerning Environmental Protection and Management (hereinafter "PPLH Law") which has annulled the enforcement of environmental criminal law in Indonesia which explicitly regulates the ultimum remedium principle which requires the application of criminal law enforcement as a last resort after the implementation of administrative law enforcement is deemed unsuccessful 7.

However, if you look at the regulation of environmental law enforcement in the PPLH Law which regulates specialization in administrative and civil instruments, the affirmation of the ultimum remedium principle as a specialization of criminal instruments in environmental law does not apply to all criminal acts regulated in the PPLH Law. The criminal sanctions in the PPLH Law are regulated in Articles 98 to 120. Where it is regulated that only Article 100 of the PPLH Law applies the ultimum remedium principle while other articles use the primum remedium principle or principle which means that criminal provisions are not as a last resort but can be applied at any time if it fulfills the criminal elements. The exception to the principle of primum remedium is only in criminal acts of violating waste water quality standards, emissions, and disturbances 8.

The existence of differences in principles in the criminal instruments regulated in the PPLH Law certainly illustrates that there is a special paradigm adopted in environmental law enforcement in Indonesia so that the ultimum remedium principle is applied in a limited way. As for the author's view, it is necessary to explore how the construction of the Criminal Policy System in the Settlement of Environmental Crimes in Indonesia should be if it is associated with the Environmental Rule Of Law Paradigm.

2 Problem

Based on the background narrative, the author formulates the formulation of the problem raised in this paper, namely how the benefit-based criminal system should be in the Settlement of Environmental Crimes in Indonesia if it is associated with the Environmental Rule of Law Paradigm.

3 Research Results

3.1 Legal Politics of Using Criminal Instruments in Enforcement of Environmental Cases in Indonesia

Internationally, the inclusion of acts that damage the environment as a violation of the law cannot be separated from the universal demand for the importance of protecting the carrying capacity of the environment for human life. The Council of Europe Resolution 77 (28) which emphasizes the need for the contribution of criminal law in the context of protecting the environment, then UN General Assembly Resolution No. 45/121 of 1990 also accepted a resolution on environmental protection with criminal law proposed by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders. Similarly, the recommendation from the AIDP Preparatory Colloquium on the Application of Criminal Law to Crime Against the Environment in Ottawa, Canada (1992) emphasized the need to consider the use of criminal law to protect environmental sustainability. Then in March 1994, in Portland, Oregon, USA, the International Meeting of Experts on Environmental Crime was held. The meeting discussed the use of criminal sanctions in the framework of environmental protection in international, regional, and domestic scope which then resulted in The Portland Draft [1]. The recognition of the importance of using criminal instruments in protecting the interests of the environment internationally has also been contained in the resolution "The Eight UN Congress on the Prevention of Crime and the Treatment of Offenders" held in Cairo, Egypt, from April 29 to May 8, 1995. And the Work Program of The Commission on Crime Prevention and Criminal Justice 1992–1996 [1].

Renewal of regulations regarding the environmental legal system cannot be separated from the various challenges that arise in the dynamics of environmental law enforcement in Indonesia along with the changing times, some of the challenges that arise include various types of crime typologies, massive crime scales and the locations of crimes that occur. Spread even across administrative boundaries, the magnitude of the impact and the value of the losses incurred, as well as increasingly dynamic and organized crime modes [5]. This then distinguishes the nuances of law enforcement in the norms regulated in the PPLH Law from previous environmental regulations.

Law enforcement, including administrative law enforcement, is an important element in environmental protection and management based on the PPLH Law. Based on the General Elucidation of the PPLH Law, law enforcement is projected as follows [6];

> "Preventive efforts in the context of controlling environmental impacts need to be carried out by making maximum use of monitoring and licensing instruments. In the event that environmental pollution and damage have occurred, it is necessary to take repressive efforts in the form of effective, consequent, and consistent law enforcement against environmental pollution and damage that has occurred".

Based on the provisions contained in the explanation, it can be seen that the PPLH Law basically utilizes various legal instruments, both administrative, civil, and criminal law where the three legal instruments are preventive, repressive and judicial efforts carried out within the framework of environmental protection and management. The PPLH Law itself is set by the Government as the basis for regulating provisions on the

protection and management of the national environment (general environmental law) in addition to other sectoral laws [7].

The existence of policies regarding general provisions for environmental protection and management (general environmental law) in its development is strongly influenced by legal politics in a country from the formation of regulations to the settlement of concrete cases. If it departs from the point of view of legal politics as the goal of the establishment of a legal policy, then at the level of legislation, the direction of legal politics can be seen from the objectives of the establishment of a law, including those relating to the environment. In the PPLH Law as general environmental law, according to Article 3 of the UUPLH, it is stated that the objectives include:

- Protect the territory of the Unitary State of the Republic of Indonesia from pollution and/or environmental damage;
- Ensure safety, health and human life;
- Ensure the survival of living things and the preservation of ecosystems;
- Preserve the function of the environment;
- Achieve harmony and environmental balance;
- Ensure the fulfillment of justice for present and future generations;
- Guarantee the fulfillment and protection of the right to the environment as part of human rights;
- Controlling the wise use of natural resources;
- Realizing sustainable development; and
- Anticipating global environmental issues.

The objectives stated in Article 3 of the PPLH Law are motivated by the provisions of the 1945 Constitution which states that a good and healthy environment is a human right and a constitutional right for every Indonesian citizen. Therefore, the state, government and all stakeholders are obliged to protect and manage the environment in the implementation of sustainable development so that the Indonesian environment can remain a source and life support for the Indonesian people and other living creatures [6]. The objectives stated in Article 3 are basically multi-dimensional in nature, and with this goal, of course, the environmental law enforcement system can no longer be implemented through the same paradigm and method as law enforcement in general, but there are special characteristics in the system of environmental law enforcement. One of the special characteristics of the environmental law enforcement system based on the PPLH Law is the enforcement of environmental criminal law in Indonesia which explicitly regulates the ultimum remedium principle which requires the application of criminal law enforcement as a last resort after the implementation of administrative law enforcement is deemed unsuccessful [6].

The affirmation of the ultimum remedium principle or ultima ratio in environmental regulations certainly indicates a special character of criminal enforcement in the environment, this is because in general the ultimum remedium principle has become an inherent principle in the application of criminal policies and specifically in the study of punishment [8]. When viewed from the existing legal instruments, one of the specifics of the ultimum remedium principle in the settlement of environmental cases can be seen from the mechanism for resolving environmental cases which prioritizes settlement through administrative and civil law instruments rather than criminal law instruments,

with principles that do not exclude each other, meaning that if can be completed with administrative instruments, the instrument of criminal law is no longer implemented, this is theoretically called the Una-Via principle, which means, if a case has been administratively resolved, the opportunity to settle the case with other legal means is closed [9].

Enforcement of environmental laws based on administrative instruments is basically preventive in nature where the target is acts that violate the applicable legal provisions. Administrative sanctions are applied by government officials who have an instrumental function in controlling prohibited acts, namely the prevention and control of acts aimed at providing protection to the interests guarded by the provisions that are violated. This is the implementation of the Government's function in the field of guidance and control considering that environmental and forestry management is carried out by the government, the function of granting permits to the public or legal entities as certain business actors is an administrative control mechanism that must be carried out [10].

In addition to administrative law instruments which are the realm of public law, environmental law enforcement through civil law instruments also has a special character based on the PPLH Law which distinguishes it from civil instruments in general, where the instruments in civil law provisions based on the PPLH Law include the settlement of environmental disputes in court or out of court. Settlement of environmental disputes in court includes group representative claims, environmental organizations' rights to sue, or government lawsuits. Through this method, it is hoped that in addition to creating a deterrent effect, it will also increase the awareness of all stakeholders about the importance of protecting and managing the environment for the lives of present and future generations [6].

3.2 Construction of the Criminal System in the Settlement of Environmental Crimes in Indonesia When Associated with the Environmental Rule of Law Paradigm

UNEP (United Nations Environment Program) as a United Nations organ that has a mandate to facilitate the formulation of policies, declarations and international agreements in the environmental field, through the Governing Council meeting has resulted in decisions in which the term "environmental rule of law" was first known [3]. Which according to Fulton is defined as "actualization of thos expectation, a state of existence, in which the law in fact prevails" which implies an effort to realize environmental law norms into factual reality in our nation's life or make environmental law norms apply empirically [3]. The importance of the Environmental rule of law is mentioned in the first global report published in 2019 as "….an essential platform underpinning the four pillars of sustainable development—economic, social, environmental, and peace" [4].

In concrete implementation, the environmental rule of law requires 3 (three) constituent components, including: "law should be consistent with fundamental rights, law should be inclusively, developed and fairly effectuated; and law should bring forth accountability not just on paper, but in practice—such that the law becomes operative through observation of, or compliance with, the law". In the environmental rule of law paradigm, criminal instruments in environmental cases are applied proportionally, by mandating that sentencing is carried out by prioritizing prevention purposes

and strengthening civil and administrative instruments, especially in order to balance business interests and environmental interests, as stated in the first global report, that [4]:

> While businesses may be able to write of fines and compensation as a "cost of doing business," especially if the amounts are less than the profit gained, the prospect of a corporate official serving prison time can change corporate culture. Probation can also deter noncompliance. As such, it is an important remedy for those who enforce environmental law to have at their disposal. But because it can be difficult to prove criminal cases and because people accused of criminal violations often fight the charges vigorously, civil and administrative powers should also be available.

Meanwhile, based on the environmental rule of law paradigm, it is certainly necessary to have a special enforcement mechanism in cases of environmental crimes that are adapted to the principles contained in the environmental rule of law. The need for a special mechanism since 1992 has actually existed in the United Nations Conference on Environment and Development, which has adopted several general principles for enforcing environmental crime cases. Namely in Principle 10 of the Rio Declaration, which specifies the need for 'Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided' by states in environmental matters.

Pring and Pring [11] themselves have explained that what is meant by effective 'access to justice' can be seen in three basic criminal justice processes – namely at the beginning, middle and at the end of the judicial process:

- Access to get to and through the environmental courts and tribunals door;
- Access within the environmental courts and tribunals to proceedings which are fair, efficient, and affordable, and
- Access to enforcement tools and remedies that can carry out the environmental courts and tribunals decision and provide measurable outcomes for preventing or remedying environmental harm.

One of the solutions developed in order to create a special mechanism for solving environmental crimes is through a restorative justice approach as an approach that is expected to create a problem-solver-oriented criminal justice system in order to solve environmental crimes effectively.

In the concept of problem-solving-oriented criminal justice, the attention paid to the idea of 'restorative justice' has tended to increase, where the restorative justice perspective is informed by concepts such as reparation for harm, social recovery, community harmony and problem solving. This is in contrast to the retributive justice system which is essentially punitive, with a primary focus on using punishment as a means to prevent future crimes and to provide a 'fair trial' for any harm done. The restorative approach is concerned with prioritizing harmonious relations through restitution, reparations and reconciliation involving perpetrators, victims and the wider community [11].

The use of a restorative justice approach in the judicial process to date is also seen as an innovation in the formation of a special justice system in solving environmental crime cases, where in its development more than 100 countries have experimented with restorative justice in criminal cases [12]. With restorative justice, perpetrators, victims,

and communities come together to address the wounds caused by crime [13]. It is critical that this approach protects the most vulnerable and does not result in further harm. These remedies have been used, for example, in Australia to address the damage to community cultural resources and the illegal logging of trees on private property [14].

The application of restorative justice is also basically in line with the need for a judicial system that is oriented towards problem solving (problem solver court) in solving environmental cases in the context of recovering victims of environmental crimes which in the study of green criminology have various subjects ranging from humans, the environment itself, to the animals. For example, the application of restorative justice in the settlement of environmental cases can be studied in Australia through the Victorian Environment Protection Authority ('EPA'), which uses a restorative justice approach as a strategy in resolving environmental cases [15]. The strategy in the Restorative Justice approach as a mechanism for resolving environmental cases is defined as [15]:

> A way to intervene in the behavior of the violation by bringing the involved and affected parties together for a mediated discussion to collectively resolve how they will respond to matters arising from the violation. Victims and/or community play an active role in the process, raising and sharing their concerns, while perpetrators are encouraged to take responsibility for their actions with the intention that this will lead to positive behavior change. The process may include community projects, public apologies, and helping build stronger relationships between businesses and communities.

The strategy then forms what is called a "restorative justice conference" as a conference forum containing structured meetings where the impact or consequences and restitution for a violation are discussed. The effort taken is to determine a constructive alternative to a prosecution, which allows the perpetrator to voluntarily enter into a binding agreement to carry out the task of resolving alleged violations of the law and repairing the damage caused to the environment and society. An example can be seen in the case of SITA as the owner of the Hallam Road Final Disposal Site, meeting with EPA and victims (eg community members and affected residents) to seek firm action. Under the enforceable effort, SITA 'expressed a statement of regret and was required to donate $100,000 to a community environmental project [15].

In Indonesia, a mechanism similar to the restorative justice forum in Victoria (Australia) is a mediation forum in cases of claims for compensation for environmental damage submitted by both individuals and the government which are part of civil instruments as regulated in the Law of the Republic of Indonesia Number 32 of 2009 concerning Environmental Protection and Management. The use of civil compensation instruments through civil mediation forums related to the settlement of environmental cases in the author's view is a good trend considering that civil agreements mean acknowledging the existence of environmental problems and are considered to be able to find common ground and solutions to environmental problems. Through the civil lawsuit instrument, it is possible for the plaintiff to ask for accountability in the form of recovery as compensation for various impacts of environmental damage. However, the use of the civil lawsuit instrument also does not fully meet the success, if you look at the performance

data of environmental law enforcement in 2015–2021, civil compensation for environmental cases can reach a value of 20.7 trillion rupiah with the value of cases that have not been executed reaching 20.5 trillion.

The lack of execution of environmental civil cases is clearly closely related to the weak mechanism for the execution of environmental cases in Indonesia, which requires the voluntary nature of the executed parties and the strength of the implementing institutions for civil executions. In addition, the unclear regulations governing the mechanism for the execution of environmental cases through civil instruments have also contributed to the protracted execution of environmental cases that have been decided in court, whether by agreement or not.

If you look at the trend of using a restorative justice mechanism strategy in solving environmental criminal cases in various countries, the restorative justice mechanism has many benefits related to the interests of environmental restoration through the establishment of a restorative justice forum that brings together every stakeholder, both perpetrators and "victims" in interacting and providing assistance. Voice, restorative justice forum itself is carried out through face-to-face dialogue facilitated between stakeholders regarding the types of violations that exist. The court will then consider the agreement reached by the conference when convicting the perpetrators of these environmental crimes [15]. Settlement of environmental criminal cases through a restorative justice forum itself can basically cover the weaknesses of civil dispute resolution through the element of coercion which is basically more assertive through criminal law enforcement.

Actually, the use of restorative justice mechanisms in environmental cases in Indonesia is in line with the direction of criminal law reform which is basically aimed at reforming legal instruments that accommodate values and various interests that take into account the psychological and political aspects of the country [16]. As according to HL Packer [17] and Muladi [1] which gives the description that [18]:

> "…Basically in criminal law there are 'competitive' interests, namely between protecting citizens from disorder and insecurity with the "crime control model" and protecting the interests of citizens from authority and unwanted interference through the "due process model". Therefore, the criminal justice system of a country is often used as an indicator to assess how far a country is considered civilized, progressive or truly democratic".

Based on this, it can be seen that the criminal system itself is not a closed system because the values protected in it are not only the value of certainty aimed at public order but also the value of justice and benefit, especially for the environment in environmental criminal cases. Especially in the characteristics of environmental cases which are full of the interests of meeting the economic needs of the community, which can be disrupted due to the criminal system that prioritizes a retributive approach.

The environmental criminal system is based on its own benefit, placing criminal instruments as a strong prevention effort by prioritizing the application of restorative justice mechanisms to identify the need for environmental restoration and community losses arising from an act that damages the environment. Where in this mechanism all parties have been involved from the start, for example in cases involving business actors in the form of corporations. The government, society, and corporations suspected

of having done environmental damage meet in a forum to identify the consequences of the actions of business actors on the environment, find solutions for recovery, and determine an action plan for environmental restoration. This is then stated in a decision or stipulation issued by the court to then be carried out by the party who has been obliged.

4 Conclusion

Based on the narrative of the results of the research above, it can be seen that the settlement of environmental criminal cases can no longer be resolved through the traditional criminal approach with retributive objectives that emphasize the purpose of retaliation with the instrument of sanctions. Through the environmental rule of law paradigm which conceptualizes the subject of both perpetrators and victims in cases of environmental crimes, the settlement of environmental crimes must be carried out through special multi-aspect enforcement mechanisms involving various stakeholders.

The environmental criminal system is based on its own benefit, placing criminal instruments as a strong prevention effort by prioritizing the application of restorative justice mechanisms to identify the need for environmental restoration and community losses arising from an act that damages the environment. Where in this mechanism all parties have been involved from the start, for example in cases involving business actors in the form of corporations. The government, society, and corporations suspected of having done environmental damage meet in a forum to identify the consequences of the actions of business actors on the environment, find solutions for recovery, and determine an action plan for environmental restoration. This is then stated in a decision or stipulation issued by the court to then be implemented by the party who has been obliged.

The application of a restorative justice mechanism in Indonesia itself is very possible, considering that it can be seen in the 2020–2024 RPJMN that it is stated that one of the policy directions and strategies implemented in achieving the main goals of development in the legal sector is “Implementation of the Restorative Justice Approach, although in its current application the use of Restorative justice mechanisms have not been implemented in environmental criminal cases, but considering the large impact of environmental damage due to environmental crimes today, the establishment of a justice system that is oriented towards solving environmental problems through a restorative justice mechanism is clearly needed.

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